

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3510

IN THE MATTER OF:

Served June 4, 1990

Formal Complaint of AIR COURIERS )  
INTERNATIONAL GROUND TRANSPORTATION )  
SERVICES, INC., Trading as )  
PASSENGER EXPRESS Against MADISON )  
LIMOUSINE SERVICE, INC. )

Case No. FC-90-02

On March 27, 1990, Air Couriers International Ground Transportation Services, Inc., trading as Passenger Express (Passenger Express or Complainant) filed a formal complaint against Madison Limousine Service, Inc. (Madison or Respondent). The central allegation of the complaint is that Madison has performed and is performing for-hire transportation of passengers between points in the Metropolitan District without the authority required by the Compact, Title II, Article XII, Section 4(a). Passenger Express asks that Madison be required to answer the complaint, that the Commission investigate the complaint, that Madison be ordered to cease and desist from conducting operations in violation of the Compact, and such other relief as the Commission may consider appropriate.

More specifically, the complaint alleges that Madison provides for-hire transportation of employees of Pan American World Airways, Inc. (Pan Am), between Washington Dulles International Airport (Dulles), Loudoun County, VA, and points in the District of Columbia.

On April 26, 1990, Madison filed an answer to the complaint. Madison asks that the Commission dismiss the complaint without hearing pursuant to the Compact, Title II, Article XII, Section 13(a) because (1) the complaint is misleading and (2) a formal investigation of Madison would be contrary to the public convenience and necessity. In support of its request, Madison asserts that, notwithstanding Complainant's contract with Pan Am and its WMATC Authorization No. SP-55-02 to provide the service at issue for Pan Am, Complainant is not able to provide the service because the contract calls for service upon request, and Pan Am no longer requests it. Respondent further asserts that Complainant informed Pan Am on or about December 11, 1989, that Complainant refused to provide the service at issue. This action, according to Respondent, placed Complainant in violation of its contract, its WMATC operating authority, and the Compact, Title II, Article XII, Section 3. Madison asserts that Passenger Express' "unclean hands" should prevent it from bringing about an investigation into a situation for which it is largely responsible.

Madison further asserts that Passenger Express'

. . . willful refusal to fulfil its contractual duty to Pan Am is what triggered Pan Am's urgent request that Madison execute the Agreement for Transportation Services on December 11, 1989.

Madison also asserts that Complainant's true interest in this matter is to eliminate competition. Madison states that it "recognizes and honors its duties under the Compact . . . ." Madison "acknowledges that it has had occasional difficulty in recognizing the impact on Madison of some of the Commission's requirements." Madison notes that it has filed in good faith an application 1/ that would authorize Madison's service of Pan Am at Dulles and eliminate any need for a formal investigation.

#### DISCUSSION AND CONCLUSIONS

This matter is properly before the Commission pursuant to the Compact, Title II, Article XII, Section 13, in that it meets that section's initial provision that:

Any person may file with the Commission a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto.

Complainant alleges that Respondent has conducted and continues to conduct transportation for hire persons between points in the Metropolitan District, in violation of the Compact, Title II, Article XII, Section 4(a), which provides in pertinent part:

No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation . . . .

Madison holds WMATC Authorization No. SP-132-03, which authorizes:

CHARTER OPERATIONS PURSUANT TO CONTRACT with Air France transporting crew members of Air France, together with mail, express, and baggage in the same vehicle with

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1/ On March 27, 1990, Madison filed Case No. CP-90-01 for authority to conduct the Pan Am service at issue. In support of the application, Madison filed a contract with Pan Am effective December 11, 1989, together with amendments dated February 5, 1990, and March 21, 1990. The application was denied by Order No. 3496, served May 2, 1990.

passengers, between Washington Dulles International Airport, on the one hand, and, on the other, hotels located in the District of Columbia.

RESTRICTED: to transportation in vehicles with a manufacturer's designed seating capacity of 15 passengers or less, including the driver.

Authorization No. SP-132-03 is narrowly drawn and does not authorize the service here at issue.

Section 13 further provides:

If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable grounds for an investigation, the Commission shall investigate the matters complained of.

Respondent has not satisfied the complaint. It has neither denied nor refuted the central allegation of unauthorized operations. Commission Rule No. 13-02 requires that an answer to a complaint must admit or deny each material allegation. Any reasonable reading of Madison's answer of April 26, 1990, shows it to be an admission against interest that tends to establish the central material fact in the case. See Kellner v. Whaley, 148 Neb. 259, 27 N.W. 2d 183, 189 (1947). Complainant has presented reasonable grounds for an investigation of its complaint, and the Commission concludes that the investigation can be conducted on the basis of the record as filed. In so concluding, we are mindful that Section 13 refers to a hearing:

At least ten (10) days before the date it sets a time and place for a hearing on a complaint, the Commission shall notify the person complained of that the complaint has been made.

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If, after affording to interested persons reasonable opportunity for hearing, the Commission finds in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Commission shall issue an appropriate order to compel such person to comply therewith.

The first cited reference primarily concerns notice, and there is no challenge in this proceeding as to the adequacy of notice. The complaint was served upon Respondent by the Commission's Executive Director. Respondent has understood and responded to the complaint. The second cited reference concerns whether Respondent has been afforded a reasonable opportunity for hearing. Here the Commission must be concerned with whether its authority is being fairly exercised within the concept of due process of law, whether the issues are

clearly defined, and whether Respondent has had the right to present argument and evidence, to cross examine, and to have findings supported by evidence. The Commission so finds.

As to cross examination, nothing relevant to the gravamen of this complaint is in dispute. From the beginning, both parties have been represented by counsel. There is no legitimate purpose to be served at this time by oral hearing or cross examination. Respondent has had as full and fair a hearing as is required by due process of law. Given Respondent's admission against interest by pleading, it is necessary to rely upon the complaint for little more than an actionable allegation.

Based on the record in this case there is no doubt that Respondent has and is engaged in transportation for hire of persons between points in the Metropolitan District, within the purview of the Compact, Title II, Article XII, Section 1(a) and without a certificate of public convenience and necessity as required by the Compact, Title II, Article XII, Section 4(a). The Commission so finds.

Madison's Authorization No. SP-132-03 was issued pursuant to Commission Order No. 3046, served July 6, 1987, in Case No. CP-87-04. In that case, as well as in the denied application for the service here at issue, Madison filed a statement as part of its notarized application that:

. . . the owner and chief operator of Madison, certifies that he is familiar with the terms of the Compact and the rules, regulations and requirements of the Washington Metropolitan Area Transit Commission, and will comply therewith.

WMATC carriers are required to comply with the Compact and the requirements of the Commission thereunder. Because of Respondent's carrier status, experience, and certified familiarity with the Compact and its requirements, the Commission finds the violation to be wilful. Even though Madison suggests that it has "had difficulty in adhering to every aspect of the sometimes complex requirements," the Commission notes that in this case and in a number of other cases before the Commission, Madison has always been represented by counsel. Moreover, in filing a number of successful applications, Madison clearly understands the elementary necessity of having the required operating authority. Our task now is to fashion a remedy.

As quoted previously, Section 13 provides that if the Commission finds that any person has failed to comply with any requirement of the Compact, it shall issue an appropriate order to compel such person to comply. In addition, the Compact, Title II, Article XII, Section 4(g) provides in relevant part:

Any . . . certificate . . . may, upon complaint, . . . after notice and hearing, be suspended, changed, or revoked . . . for wilful failure to comply with any

lawful order, rule, or regulation of the Commission, or with any term, condition, or limitation of such certificate . . . ."

The Commission has also considered Wilkett v. I.C.C., 710 F.2d 861 (D.C. Cir. 1983). There, the United States Court of Appeals for the District of Columbia Circuit noted certain criteria it considered appropriate for the Interstate Commerce Commission to apply when considering a carrier's fitness and violations.

When judging a carrier's fitness in light of past violations, the Commission has consistently applied the following test:

In determining the fitness issues, consideration must be given to the nature and extent of violations, such mitigating circumstances as might exist, whether the carrier's conduct represents a flagrant and persistent disregard for the provisions of the act, and whether sincere efforts have been made to correct past mistakes.

Greyhound Lines, Inc. v. The Gray Line Scenic Tours, Inc., 121 M.C.C. 242, 265 (1975). 2/

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The Commission has recognized the necessity to carefully consider the nature and extent of violations and any mitigating factors because

otherwise the denial of a certificate on the basis that the carrier is unfit would be a punitive measure directed only at past unlawful operations, and as a practical matter, amount to retribution, not sound regulation. To avoid this pitfall, consideration of a carrier's fitness should embrace an evaluation of its willingness and ability to comport in the future with the applicable rules and regulations of this Commission.

Eagle Motor Lines, Inc., supra, 107 M.C.C. at 503. 3/

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2/ Wilkett v. I.C.C., 710 F.2d 861, 864 (D.C. Cir. 1983).

3/ Id. at 865.

Respondent's motion to dismiss the complaint, filed as part of its answer of April 26, 1990, is hereby denied. Respondent is hereby directed to cease and desist from transportation covered by the Compact, except to the extent such transportation is authorized by Authorization No. SP-132-03. The Commission has determined that suspension or revocation of Authorization No. SP-132-03 is neither warranted nor appropriate at this time, and we do not at this time make a finding that Respondent is unfit to operate the service authorized therein.

The Commission does, however, make a tentative finding that the wilful violation found in this case may render Respondent unfit to receive any grant of additional authority. If continued, such violations would tend to show an unwillingness or inability of Respondent to comply with the requirements of the law and could, for that reason, necessitate the revocation of Authorization No. SP-132-03.

In reaching this tentative finding, the Commission is mindful of the nature and extent of the violations. We find no legitimate mitigating circumstances. <sup>4/</sup> We are concerned whether this violation shows a flagrant and persistent disregard for the law and whether Respondent is willing to correct past practices.

No applications for operating authority will be accepted from Respondent for 90 days after the date this order is issued. This will give Respondent an opportunity to show, and the Commission an opportunity to evaluate, Respondent's willingness and ability to comport in the future with the Compact and the Commission's orders, rules, and regulations. Rather than being punitive, the Commission views this remedy as rehabilitative, offering Respondent the opportunity to continue authorized operations and to demonstrate prospective compliance fitness. The Commission will take into consideration the alacrity with which Madison responds to the requirements of this order.

This proceeding will remain open. At the end of the 90 days, Respondent will certify to the Commission in detail the steps taken to correct past mistakes, to establish prospective compliance fitness, and the status of its compliance with the Compact and the Commission's requirements thereunder. Respondent will serve a copy of this certification upon counsel for Complainant. Complainant will have five business days to respond. The Commission will consider Respondent's

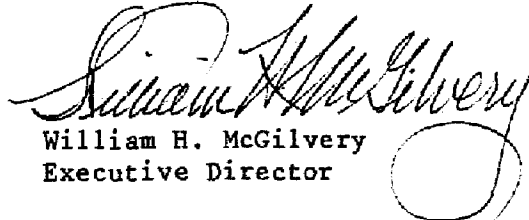
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<sup>4/</sup> Even if, as Madison alleges, Passenger Express refused on or about December 11, 1989, to provide service to Pan Am, evidence of such refusal would have provided compelling support for an application of Madison to provide the service. However, it does not support Madison's providing the service without authorization. We note, too, that Passenger Express is obliged to provide service pursuant to the terms of its contract and authorization.

certification, Complainant's response, if any, and such other evidence as is then properly before it in this proceeding. At that time the Commission will determine how to proceed with this case.

IT IS SO ORDERED.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS WORTHY, SCHIFTER, AND SHANNON:

  
William H. McGilvery  
Executive Director